involve the use of an imbedded rate base. In this regard, it is the position of the APSC that Congress intended for the states to retain the flexibility to determine which cost based methodology is most appropriate for their respective jurisdiction. Accordingly, the FCC's discussion of specific costing methodologies and costing elements at various points in the NPRM (particularly at ¶ 144 - 148) are enlightening, but certainly cannot be held to be binding when the states make their determinations regarding costing methodologies.

The APSC has already shifted its regulatory emphasis toward cost based pricing and is currently engaged in proceedings to determine the most appropriate costing methodology for Alabama. For the purpose of interconnection, the APSC is currently evaluating long run incremental costing methodologies. The APSC is further concerned with the ambiguity of similar Interstate and Intrastate access elements and rates. The long term solution should be that local interconnection and access rates be equal. If not, Commissions can not verify differences without a definitive process such as Percentage Interstate Usage (PIU). A process similar to PIU in the new environment would likely be a nightmare for all parties.

At NPRM ¶ 134 through 143, the FCC again assumes overly broad preemptive authority to establish national pricing guidelines. As an alternative to establishing a particular pricing methodology, the FCC seeks comments in those paragraphs on the benefits, if any, of adopting a national policy of outer boundaries for reasonable rates. The FCC discusses numerous methodologies for establishing rate ceilings, and possibly rate floors, for purposes of defining a reasonable range within which state commissions could establish rates for interconnection and unbundled elements in the arbitration process pursuant to Sections 252(b) through (e). Lost in the discussion is the fact that the jurisdiction for determining intrastate rates for those matters lie exclusively with the states.

Congress clearly stated in Section 252(d) that the justness and reasonableness of rates for interconnection and unbundled elements, as well as wholesale rates for resold services, are state determinations. There is no indication in the statutory language that states must adhere to any FCC-established, reasonable range in making their determinations.

The assault on the state determination of rates escalates at NPRM ¶ 152 through 154 wherein the FCC seeks comment on whether it should require states to adopt rate structures that are, among other things, cost causative. Detailed discussion of those matters as raised by the FCC in the noted paragraphs would be counterproductive given the fact that nothing in Section 251 gives the FCC the authority to impose such a requirement on the states.

At ¶ 156 and 157, the FCC seeks comment regarding the term "nondiscriminatory" as used in the 1996 act. Specifically, the FCC seeks comment on the comparison, if any, of "nondiscriminatory" as used in the 1996 Act and the phrase "unreasonable discrimination" as used in the 1934 Act. It is the position of the APSC that "nondiscriminatory," as utilized in the 1996 Act, should be construed as having the same meaning as "unjust and unreasonable discrimination" in the 1934 Act. A strict interpretation of "nondiscriminatory" as used in the 1996 Act would preclude any variation in pricing and would appear to defeat the process of negotiation which is so encouraged in the 1996 Act. Similarly, a strict interpretation of the term "nondiscriminatory" would appear violative of the costing principles discussed in the 1996 Act. These absurd results were surely not intended by Congress. Accordingly, it is the position of the APSC that "nondiscriminatory," as used in the 1996 Act, should be construed in the same manner as "unjust and unreasonable discrimination" has been construed under the 1934 Act.

It is interesting to note that the FCC finally addresses what is arguably the 1996 Act's most explicit Congressional reservation of state authority, Section 251(d)(3), at ¶ 157 of the NPRM. The FCC therein seeks comment on the meaning of the specific terms of that Section.

As stated previously, it is clear from the retention of Section 2(b) of the 1934 Act, and the inclusion of Section 251(d)(3) in the 1996 Act, that Congress intended to allow the states to continue their respective efforts of implementing competition through the regulation of matters such as access and interconnection. It is also apparent from the language of 251(d)(3) that so long as the states do not act outside the framework of the 1996 Act by imposing requirements which prohibit competition, or by failing to fulfill any duty imposed on them by the 1996 Act, the states may continue their pro-competitive efforts. States such as Alabama who were well along the road to establishing competition prior to the implementation of the 1996 Act may continue down that path. Section 251(d)(3) is a clear Congressional directive that states are to have the flexibility needed to continue their efforts in implementing competition.

The Alabama PSC agrees that setting the price of discrete services and elements equal to the forward-looking LRIC of each service or element is not likely to recover the historical costs of incumbent LEC's networks. While we do not have verified empirical data on the magnitude of the difference between the historical cost incurred by the incumbent LECs and the forward-looking LRIC of the services and facilities they will be providing pursuant to section 251, we do have concerns about the recovery of the costs incurred by the incumbent LECs to fulfill statutory requirements. Some economists have calculated the difference in the costs to be over $20 billion. We agree with the conclusion in the NARUC Subcommittee Report that in some circumstances recovery of past investments decisions by incumbents is appropriate. These determinations would have to be made by the states based on the experience of the individual companies with the state. In some jurisdictions legal requirements may mandate recovery of these costs.

The decisions made in the pending Joint Board proceeding are pivotal to decisions made in this proceeding. The recovery of universal support that may be included in the difference between historical cost and LRIC costs must be determined to make rational decisions required in this proceeding. The pricing of interconnection, collocation and unbundled network elements are interrelated to the size of the universal service fund and the recovery mechanisms determined in the Joint Board proceeding. This interrelationship supports the need for states to have the flexibility to make the determinations regarding pricing and rate structures in response to the requirements of the 1996 Act.

e. Interexchange Services, Commercial Mobile Radio Services, and Non-Competing Neighboring LECs

Due to the current procedural status of APSC proceedings addressing the matters discussed under this heading, it would not be appropriate for the APSC to submit comments regarding the same. We do , however, reserve the right to file reply comments if we are in the procedural position to do so.

3. Resale Obligations of Incumbent LECs

Section 251(c)(4) prohibits all LECs from imposing unreasonable restrictions on resale, but only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers. The requirement to offer retail services at wholesale rates is specifically placed upon incumbent LECs as stated in Section 251(c)(4). Section 251(b)(1) places upon all LECs the duty not to prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunications services. There is no requirement for entrant LECs to resell these services at wholesale prices. The state commission can best determine whether an entrant LEC is capable of reselling its retail services at any price and is required to do so pursuant to the provisions of § 252(d)(3).

We believe that Congress intended for all telecommunications services of the incumbent LEC to be available at wholesale rates. However, Section 251(c)(4) allows the restriction of the resale of certain retail services by the incumbent LEC if deemed necessary by the state commission. Restrictions and conditions should be narrow since such restrictions and conditions are likely to be used to limit competition. We believe that a state commission should place restrictions on the resale of certain services if unrestricted resale of those services would unduly affect the incumbent LECs retail customers. This is especially true if a service is priced for retail sale below cost. However, the incumbent LEC should have the burden of proving that a restriction it imposes is reasonable and nondiscriminatory.

The state commission may also restrict the resale of a telecommunications service obtained at wholesale rates which is restricted to a specific category of subscribers at retail rates. In Section 251 (c)(4), the requirements are "not to prohibit, and not to impose discriminatory conditions or limitations on the resale of such telecommunications services" with the exception that a state commission may prohibit a reseller from offering a service to a different category of customers if the retail sale of that service is also restricted to a specific category of customers.

If the incumbent LEC is required to provide discounts and promotions for resale at wholesale rates, the entrants' customer should be held to the same restrictions that apply to the incumbent LECs retail customers. This insures nondiscrimination by both the incumbent LEC and the entrant.

However, the state commission currently determines whether such discounts and promotions are to be allowed by the incumbent LEC and thus should be allowed to continue its regulation of the local exchange market in the determination of whether the incumbent LEC should be required to provide discounts and promotions for resale at wholesale prices.

The Alabama PSC has restricted the resale of flat-rate residential, flat-rate single line business, and flat-rate business trunks in its Local Competition Order dated September 20,1995 This Order stated that the APSC will establish a separate docket to determine unrestricted resale of local service and determine whether, and to what extent, resold services should be offered at a discount.

The incumbent LEC should be required to make a showing that withdrawing an offering is in the public interest or that competitors will continue to have an alternative way of providing service before withdrawing the service. Recognizing that an incumbent LEC can thwart competition by failing to offer service or withdrawing a service offering, the APSC has reserved the authority to review such issues.

The Act states that for the purposes of section 251(c)(4) a state commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and/or other costs that will be avoided by the local exchange carrier. We believe that the determination of avoided costs should be left to the state commissions. Certain costs such as those specified above are easily identified as costs which can be avoided on the wholesale level; other costs are not so obvious. Certain overhead costs may be avoided on the wholesale level but not the retail level. The state commissions have staff who are familiar with the costs associated with local exchange companies and who are well qualified to determine what costs could be avoided at the wholesale level. For the FCC to attempt to establish principles or rules regarding avoided costs or wholesale pricing is both unnecessary and imprudent in light of the expertise of state commissions and the lack of such expertise within the FCC with regard to assessing the cost components of the local exchange market. Therefore, even the determination of whether an allocation of avoided costs should be across services or whether the amount of the wholesale discount will vary based on the degree, the avoided costs relate to certain services is a determination left to the state commissions.

The FCC has also asked for comments concerning the relationship between rates for unbundled elements and wholesale rates for resale. Some states have adopted imputation rules requiring that the sum of rates for unbundled elements can be no greater than the retail service. Other states have not found that an imputation rule is necessary. The lack of an imputation rule could be determined to be anti-competitive; however, applying an imputation rule may be difficult if rates for the retail services are below cost due to implicit, non-competitively neutral subsidy flows. Because the retail rates and subsidies differ among states, the issue of imputation should be left for each state commission to decide. The state commissions should have the flexibility to set rates based upon the particular circumstances within each state. Many state commissions have already established rules regarding these issues. The treatment of these issues has varied from state to state. The FCC, in its wisdom, has recognized that each of the different treatments by the states has merit.

We believe that the intent of Congress was to provide guidelines for the state commissions to follow in implementing local competition. We believe that Congress intended that the FCC would institute only those rules and regulations necessary to guarantee continuity and uniformity of service across the country. Congress did not preempt state regulation, so long as the rules and regulations of the states did not interfere with the intent of the 1996 Act. In that regard, we believe that the states can better resolve the specific requirements of local competition on a state level. Those rules and regulations promulgated by the FCC should allow the states latitude to establish their own rules within the purview of the Act.

C. Obligations Imposed on "Local Exchange Carriers" by Section 251(b)

1. Resale

Section 251(b) imposes on all LECs the obligation not to prohibit and not to impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunications services. This section requires all LECs to make their retail services available for resale, but only the incumbent LEC is required to make retail services available at wholesale rates The emphasis of this section is upon conditions or limitations which could unduly limit the resale of telecommunications services thus restricting competition.

If there is a limited number of competitors and high barriers to entry, carriers may be unwilling to provide access to essential parts of their network for resale. Therefore, all LECs including entrant LECs which have the potential to control bottleneck facilities should be subject to strong regulatory oversight.

According to the 1996 Act the states should place few restrictions on the resale of any services by the LECs. We believe that this section requires all LECs to provide services at rates that are nondiscriminatory and to provide those services on a nondiscriminatory basis. Resale restrictions could reduce customer choice and be detrimental to smooth functioning of the public switched telecommunications network. Entrants should not be allowed to impose resale restrictions on their services except that a state commission may require that resale be to the same class of customers.

The provider of an essential service should not be free to forbid its resale. However, the state commission should intervene to prevent price arbitrage made possible by uneconomic pricing structures formulated under monopoly regulation. The state commission must also verify that wholesale prices are above cost.

Entrants should be considered common carriers and be required to serve any customer requesting such service in the entrant's serving area. Where the entrant is the sole provider of service, that provider should have more stringent withdrawal requirements than those in areas with more than one provider.

In its September 20, 1996, order regarding local competition the APSC has established requirements that interconnection be made available on a nondiscriminatory basis. The order further states that all local service providers will participate in the development of uniform technical standards for local interconnection. The order also requires the development of nondiscriminatory interconnection charges. The APSC is currently conducting workshops to deal with these issues.

2. Number Portability

Section 3(46) of the 1996 Act defines number portability as the ability of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another. Also, section 251(e)(2) of the 1996 Act mandates that the cost of number portability be borne by all telecommunications carriers on a competitively neutral basis as determined by Congress.

Congress recognized that the number portability, or the lack thereof, can determine whether a consumer changes local carriers. Provider portability is essential for the success of local competition. Location portability may be considered by those providers who want to provide such incentives to attract customers; however, location portability should not be a requirement at present.

Customers will be reluctant to change local carriers due to the costs incurred associated with a number change. The costs associated with number changes include number change notification, cost of changing printed material that contains phone number information, costs of updating phone number information whenever it appears publicly, and the opportunity costs of lost contacts. These costs make customers reluctant to change phone numbers in order to change local carriers. These costs also make it difficult for entrants because the entrant must mitigate the costs of the number change by offering incentives or low rates. Thus, the customer is less likely to try new and possibly unknown carriers because of these costs. Further, a dissatisfied customer will be reluctant to switch back to his former carrier if he has to incur another number change. Consequently, if customers can switch local service providers without changing their telephone numbers, local competition will be enhanced.

We believe that the effectiveness of the mechanism used to accomplish number portability will determine the customer's satisfaction with the entrant LEC to a certain extent. Remote Call Forwarding (RCF) should be used as an interim solution to number portability. Because of the longer call setup involved in forwarding the call, the customer perceives that the service offered by the entrant is of inferior quality.

The solution to local number portability is dependent upon development of a regional database to process and route calls. Additionally, in APSC's local competition workshops all parties have agreed that the long term solution is AT&T's Location Routing Number (LRN).

5. Reciprocal Compensation for Transport and Termination of Traffic

Section 251(b)(5) provides that each LEC has the duty to establish reciprocal compensation arrangements for the transport and terminations of telecommunications Section 252(d)(2), states that for the purpose of an incumbent LEC's compliance with section 251(b)(5), a state commission will not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions: (1) provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier, and (2) determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. As an interim measure, the bill and keep option may promote competition until a permanent option can be implemented; however, the bill and keep method can provide an incentive for an entrant to target business customers with a higher percentage of outbound traffic relative to inbound traffic. Bill and keep should be allowed only when (a) the transport and termination costs of both carriers are roughly symmetrical and traffic is roughly balanced in each direction during peak hours or (b) actual transport and termination costs are so low that there is little difference between a cost-based rate and a zero rate (for example, during off-peak periods). When neither of these conditions are met, bill and keep arrangements would not provide for the mutual and reciprocal recovery of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. We believe that transport and termination rates charged by the incumbent LEC should be equal to the transport and termination rates charged by the entrant. Although symmetry does not provide cost-based pricing for the entrant, equal rates eliminate the possibilities for carriers to exploit the system.

In the long run, the rates charged for transport and termination must be equal for all carriers. If not, carriers will engage in arbitrage in order to take advantage of the difference in rates. In the interim, local access providers should not be allowed to terminate non-local traffic at local termination rates so long as a distinction is made between the termination rates for local, intraLATA, intrastate interLATA, and interstate traffic. As local competition increases, distinguishing among local and toll traffic will be increasingly difficult.

The standards set by the FCC for transport and termination (if any) should allow the state commissions latitude in determining those rates. We believe that with their experience in setting local exchange rates the state commissions have the expertise to ascertain the proper method for determining transport and termination rates without FCC intervention

D. Duties Imposed on "Telecommunications Carriers" by Section 251(a)

The FCC seeks comment on which carriers are included under the definition of telecommunications carrier under the act as it relates to Section 251(a) of the 1996 Act. The FCC further seeks comment on the meaning of "directly or indirectly" in the context of Section 251(a)(1). The FCC seeks comments on whether Section 251(a) should be interpreted to allow non-incumbent LECs receiving an interconnection request from another carrier to connect directly or indirectly at its discretion.[12]

The APSC believes that Section 251(a)(1) imposes the duty of all telecommunications carriers to interconnect directly or indirectly with other telecommunications carriers. If non-incumbent LECs are allowed the discretion to determine whether to offer direct or indirect connection, the goal of promoting competition through efficient interconnection will not be realized.

F. Exemptions, Suspensions, and Modifications

The Alabama PSC concurs with the FCC's tentative conclusion that the states alone have the authority to make determinations under § 251(f). The states are in the best position to evaluate

12 NPRM para. 245

interconnection requests and their impact on rural telephone companies. We do not believe it is necessary for the FCC to establish standards to assist the states in satisfying its obligations under this section. The states posses a depth of experience in dealing with the unique circumstances that are encountered by rural telephone providers.

III. PROVISIONS OF SECTION 252

A. Arbitration Process

The FCC seeks comments on whether it should establish regulations necessary and appropriate to carry out their obligations under section § 252 (e)(5) at this time.[13] The Alabama PSC agrees with the idea that the Commission needs regulations to carry out its responsibility under § 252(e)(5). We do not feel that these regulations should relate to anything other than how the FCC carries out its responsibility. The regulations should not be directives for the states, nor should they be guidelines for the states to follow prior to a matter being taken to the FCC. The 1996 Act does not give the FCC jurisdiction to set a national framework for arbitration or negotiation at the state level. Congress has intentionally left the process to the states, unless a state "fails to act to carry out its responsibility". The guidelines or regulations promulgated by the FCC must not affect the process before a state "fails to carry out its responsibility". Careful consideration should be given to these procedural rules. This NPRM does not give the FCC or the states sufficient time or information to arrive at proper guidelines for the FCC. These procedural matters should be addressed in a separate rulemaking, that is based on specific proposals for rules or guidelines.

The FCC also seeks comments on what constitutes notice of failure to act, and what procedures, if any, should the FCC establish for interested parties to notify the FCC that a state

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[13] NPRM para. 265

commission has failed to act. A state's "failure to act to carry out their responsibility" should be nothing short of complete failure to take any steps to fulfill its responsibilities. Whatever form the notice takes should be in writing, and be served on the state commission at the same time that the FCC is given notice. Also, the state commission should be afforded an opportunity to answer the allegation that it has failed to act.

The FCC seeks comments on what the relationship is between the provision in 252(e)(4) for an negotiated or an arbitrated agreement to be deemed approved if a state commission does not approve or reject them within the 30 and 90 day time limits and the FCC's obligation to assume responsibility under section 252(e)(5)[14]. Section 252(e)(4) and 252(e)(5) appear to conflict. The question arises as to at what time in the process can a carrier claim the state has failed to act since the states have an obligation to approve or reject an agreement within 30 or 90 days, depending on whether it is a negotiated or an arbitrated agreement. If the state fails to accept or reject within the time frame, the agreement is deemed approved. The state has the full 30 or 90-day time period and could not be deemed to have failed to act until the time period had run or the state had indicated that they were not going to act. Therefore, when does the carrier claim failure to act? It cannot be before the expiration of the 30- or 90- day time period, and if it is after, the agreement is deemed approved. A party seeking rejection of the agreement, has no window of opportunity in which to seek relief from a state's apparent failure to act because the time limit for a state's action coincides with the time that an agreement is deemed approved. At that time, a party seeking rejection of part or all of the agreement has an approved agreement, not an open procedure that the state has failed to act upon.

[14] NPRM para. 266

The State Commissions should not be deemed to have "failed to Act" unless they have indeed taken no action and intend to take none. In this instance the only definition of "Failure to Act" can be a state indicating that it will not act. This allows the parties to remove the matter to the FCC if they so desire. Otherwise, the parties must wait until the state's time has expired to know whether the state is failing to act, and then the agreement is deemed approved and the FCC has nothing to act upon.

The FCC asks whether the Commission's assumption of the responsibility of the state commission, binds the Commission to all the laws and standards that would have applied to the state commission.[15] We contend that it does. The states will still be responsible for enforcing state laws and ensuring that companies are treated consistently and without undue prejudice. Pursuant to Section 252(e)(3), nothing in the section prohibits a state commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards and other state requirements. Section 252 (e)(5) provides for the FCC to "assume the responsibility of the state commission under this section with respect to the proceeding or matter and act for the state commission." If the FCC is acting for the state and assumes the responsibility of the state, it would have to be bound by the same laws and standards as the state. The 1996 Act does not relegate to the FCC the authority to establish a national framework for intrastate interconnection. The states are specifically authorized to establish and enforce state law in its review of an agreement. A strict and detailed national framework would very likely conflict with specific state laws and thus would be in derogation of the congressional intent of the 1996 Act.

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[15] NPRM para. 266

The FCC seeks comments on whether the Commission is authorized to determine whether an agreement is consistent with applicable state law as the state commission would have been under section 252(e)(3)[16]. We believe the FCC must act for the state and assume the responsibility of the state.

The FCC further seeks comments whether the Commission retains jurisdiction once it assumes responsibility under section 252(e)(5). Section 252(e)(5) allows the FCC to preempt the state only as to the matters the state has failed to act upon. The state retains all other matters and the right to oversee the matter and to enforce state laws and regulations. The matter remains within the jurisdiction of the state commission for enforcement and other regulatory matters. The FCC only has the authority specifically given to it by Congress. All other matters are left for the state commissions.

B. Section 252(I)

At paragraph 270 of the NPRM the Commission seeks comment concerning the adoption of standards for resolving disputes under section 252(1) in the event that it must assume the state's responsibilities pursuant to section 252(e)(5). The APSC believes that the FCC's procedures for resolving disputes within its jurisdiction, are a matter for the FCC to promulgate. Guidelines for arbitration in the event that a matter is taken to the FCC for resolution, would certainly be helpful. The FCC must not make those standards or guidelines applicable to the states. The states are the best source of arbitration rules and procedures for themselves. Many states already have arbitration procedures in place, or are in the process or promulgating rules that will be the most efficient in their individual states.

At paragraph 271, the FCC requests comment on whether interconnection services, or

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16 NPRM para. 266

network elements provided under a state-approved section 252 agreement must be made available to any requesting telecommunications carrier, or would it be consistent with the language and intent of the law to limit this requirement to similarly situated carriers. The APSC interprets the statute to require the agreement to be made available to all similarly situated carriers. This is the only reasonable interpretation of the statute. To bind all carriers to the first negotiated agreement, no matter what the costs involved, or intended use of the service would make an initial agreement impossible to reach. To lock all carriers and the LEC into the terms and conditions of the first agreement is anti-competitive. These decisions are left to the states unless they "fail to act". As long as the states set up a framework that is non-discriminatory, the FCC has no jurisdiction over the agreements or the interpretation used by the states.

Comment is sought at paragraph 272, as to whether the agreement, after state approval, should be made available for an unlimited period, or whether the statute would permit the terms of the agreement to be available for a limited period of time. The APSC believes that the parties should be allowed to negotiate the terms of the contract, including the length of the contract. It would be unreasonable to require the parties to be bound by the terms and conditions of a contract forever when the market is changing rapidly, both technically and structurally. The parties should be able to provide for and plan for a change in economic and technical circumstances when they enter into a contract. It is in the spirit of competition that parties are given the ability to use their bargaining power to shop for the best terms and conditions to fit their current needs.

IV. CONCLUSION:

The Alabama PSC offers the above comments in response to the FCC's request in this NPRM. We reiterate that the FCC should only set minimum guidelines in response to its authority in section

251(d)(1) and not impose preemptive mandates on the states, particularly where the 1996 Act clearly confers jurisdictional authority to the states as enumerated in preceding comments.

Respectfully submitted,
Alabama Public Service Commission

By *Mary Newmeyer*
Mary Newmeyer
Federal Affairs Advisor
Alabama Public Service Commission
P.O. Box 991
Montgomery, Alabama 36101
(334) 242-5025

By *John Garner*
John Garner
Administrative Law Judge
Alabama Public Service Commission
P.O. Box 991
Montgomery, Alabama 36101
(334) 242-5200

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